Filed 12/16/08 In re Ju.H. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Ju.H. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. J.H., Defendant and Appellant.	G040525 (Super. Ct. No. DP013717) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carolyn Kirkwood, Judge. Reversed and remanded.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

No appearance by the Minors.

J.H. appeals from a judgment terminating her parental rights over her son Ju.H. and daughter Jy.H. She contends the trial court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA), and we agree the record does not establish compliance. While there is no question that respondent, the Orange County Social Services Agency (SSA), provided notice to several Indian tribes in this case, the record does not show the trial court received and reviewed the notice to determine whether it complies with ICWA. Therefore, we will reverse the judgment and remand the matter for further proceedings.

FACTS

J.H. has a long history of drug use and mental health problems, and in July 2006 those problems led to Ju.H. and Jy.H. being removed from her care. Despite receiving social services for the next 18 months, J.H.'s lot did not improve. In fact, during that period, her life spiraled downward and she eventually landed in prison. She did not appear at the permanency hearing or contest the termination of her parental rights. Throughout the case, Ju.H. and Jy.H. have resided with their maternal aunt, who hopes to adopt them.

The issue of Jy.H.'s possible Indian heritage surfaced early in the case. At the initial detention hearing, J.H. alleged that Jy.H.'s father was A.F. and that he had possible Apache Indian heritage. The social worker could not get in touch with A.F. at that time, but she was able to contact his mother H.F. She said she would not provide any information about A.F.'s ancestry until he was proven to be Jy.H.'s father.

Nonetheless, SSA sent notice of the proceedings (known at the time as JV-135 notice) to the Bureau of Indian Affairs (BIA) and several Apache tribes. Six tribes responded, and they all reported that Jy.H. was not among their rolls. Therefore, the court found ICWA did not apply to her. However, on March 20, 2007, the ICWA issue resurfaced after paternity testing confirmed that A.F. is Jy.H.'s father. Based on this

development, the court ordered SSA to further investigate A.F.'s possible Indian heritage and send out new ICWA notices to all appropriate tribes.

On July 12, 2007, the social worker prepared a report which included a section on the ICWA issue. The report states H.F. was contacted by phone in April 2007, and during the call, she claimed her husband was of Apache ancestry. The report also states H.F. "provided as much identifying information as she knew and stated that she would attempt to obtain further information and contact [SAA] with the additional information." However, she never got back to SAA, and subsequent efforts to reach her were unsuccessful. The report further states that a new round of JV-135 notice forms were mailed to the BIA and various Apache tribes on June 13, 2007.

On August 6, 2007, at the 12-month review hearing, SSA filed with the court the return receipts and the tribes' responses to the notice. (As before, none of the tribes could find any information on Jy.H. or her family based on the information SSA provided.) These documents were submitted together in a single filing that referenced in its heading both the return receipts and the tribes' responses. Although the notice form itself was not referenced in the filing, the parties filed a stipulation which provided, "ICWA notice, Request for Confirmation of Indian Status and proof of service have been filed with the court. Notice of hearing was given to the BIA and all appropriate Tribes in accordance with ICWA."

When the hearing commenced, the court stated it "has before it a signed stipulation. The court makes orders and findings pursuant to [the] stipulation. . . . ICWA notice, request for confirmation of Indian status and proof of service have been filed with the court." The court also stated it "is in receipt of ICWA documents submitted today[.]" In subsequent proceedings, including the permanency hearing on May 21, 2008, the court stated that proper ICWA notice had previously been filed with the court, and the provisions of that law did not apply to Jy.H.

J.H. filed her appeal on June 19, 2008. On July 29, she moved to augment the record on appeal to include the JV-135 notice form that was sent to the BIA and the Apache tribes on June 13, 2007. We granted the motion and directed the superior court to transmit the form to us. However, on August 4, we received a declaration from the superior court clerk which states: "The Superior Court file has been copied in its entirety and copies of the clerk's transcript were sent to all parties on July 10, 2008. [¶] It appears the requested document was never submitted to the Orange County Superior Court and is not a part of this court's file; therefore it cannot be supplied as requested. Please consider this record complete."

On September 19, 2008, respondent filed a motion to augment the record with the subject notice form, which it obtained from social services' ICWA unit. Although the form does not contain a file stamp from the superior court, respondent alleged the form was submitted to, and considered by, the trial court on August 6, 2007. We granted respondent's motion and ordered that the form be deemed a part of the record on appeal.

DISCUSSION

J.H. contends the judgment must be reversed and the matter must be remanded for further ICWA proceedings because there is insufficient evidence that the trial court ever received and considered the JV-135 notice that was allegedly filed on August 6, 2007. For reasons explained below, we agree.

As a preliminary matter, J.H. takes issue with our decision to deem the notice part of the record on appeal. As we have mentioned, the notice lacks a file stamp, and according to the clerk of court, it does not appear to be in the superior court file. And because of that, we agree with J.H. that the notice itself cannot be seen as proof it was filed in the court below. In fact, if anything, the lack of a file stamp and the clerk's declaration suggest just the opposite. However, there is no dispute that the notice is authentic and that it was sent out on June 13, 2007. Therefore, there is no harm in us

having deemed it a part of the appellate record. Our action in that regard is simply not germane to the central issue of whether the notice was actually before the juvenile court on August 6, 2007.

As to that issue, the record is clear that when the trial court made its ruling that day, it did so pursuant to the parties' stipulation. Not only did the trial court state this on the record, its ruling quotes the very language set forth in the stipulation. Namely, that "ICWA notice, request for confirmation of Indian Status and proof of service have been filed with the court." Because the court was just reading from the stipulation when it made this ruling, the ruling cannot be considered proof that the ICWA notice was actually filed with and considered by the court.

The court did mention, as well, that it was "in receipt of ICWA documents submitted today[.]" However, SSA's filing of that day referenced only the return receipts and tribes' responses to the ICWA notice; it did not reference the notice itself. We can find nothing to indicate the notice was included among those documents.

Nonetheless, respondent argues it is reasonable to infer the notice was in fact submitted to the trial court that day because in previous proceedings, the court had alluded to the need to provide proper ICWA notice to all interested parties. But we are not inclined to treat the court's desire that proper notice be given as a substitute for proof that such notice was in fact provided to the tribes and filed with the court. While the court was no doubt aware of ICWA's general notice requirements, we are unable to tell whether it actually reviewed the subject notice form to determine whether it was legally sufficient.

Respondent notes that documents delivered to a court clerk are deemed to be filed, even though they may be subsequently lost or misfiled. (*Usher v. Soltz* (1981) 123 Cal.App.3d 692, 697.) However, for the reasons explained above, we are not convinced the subject notice form was ever tendered to the clerk of court in the first place. And contrary to respondent's suggestion, this omission cannot be dismissed as

technical or insignificant. "It is the duty of the juvenile court to receive evidence of the notice efforts by [SSA] and to determine if they comply with ICWA. [Citation.] The juvenile court may not rely on mere representations that proper notice was given; there must be a court record of the notice documents. [Citation.]" (*In re Glorianna K.* (2005) 125 Cal.App.4th 1443, 1449.)

This requirement may seem technical, but it serves the important goal of protecting and preserving Indian tribes and Indian families. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) Notice "ensures the tribe will be afforded the opportunity to assert its rights under [ICWA] irrespective of the position of the parents, Indian custodian or state agencies." (*Ibid*.) To that end, the trial court must ensure the notice requirements of ICWA are strictly adhered to: "[I]t is up to the juvenile court to review the information concerning the notice given, the timing of the notice, and the response of the tribe, so that it may make a determination as to the applicability of the ICWA, and thereafter comply with all of its provisions, if applicable." (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705; see also *In re Nikki R.* (2003) 106 Cal.App.4th 844, 852 ["It is a trial court function to receive evidence of SSA's notice efforts and to determine if they measure up to ICWA standards."].)

On the record before us, we simply cannot say with confidence that the ICWA notice SSA mailed out was filed with and considered by the trial court. Therefore, the court's ruling must be reversed and the matter must be remanded for further proceedings. (See *In re Nikki R., supra*, 106 Cal.App.4th at pp. 855-856 [ordering remand where ICWA notice was not filed with the trial court]; *In re Jennifer A., supra,* 103 Cal.App.4th at pp. 709-710; [same]; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1268-1269 [same].) If it was filed and considered, the court will be able to move ahead on this case expeditiously; if it was not, our reversal serves an important purpose.

DISPOSITION

The judgment terminating J.H.'s parental rights is reversed and the matter is remanded to the juvenile court. The court shall review the notice form that was allegedly filed with the court on August 6, 2007, and which was deemed part of the record in this appeal. If, after reviewing the notice and considering all of the other pertinent evidence, the court finds respondent failed to comply with the notice provisions of ICWA, it shall order respondent to comply. If the court finds the notice is sufficient, it shall reinstate its previous findings and orders.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.